BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SANDRA SCALES PEETE	)	
Claimant	)	
VS.	)	
	)	Docket No. 245,628
CESSNA AIRCRAFT COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed the July 3, 2001, Award entered by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on January 11, 2002.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for the claimant. Edward D. Heath, Jr. of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award.

ISSUES

The only issue before the Board is the nature and extent of claimant's disability. In the Award, the ALJ found claimant unreasonably refused to perform an accommodated job with respondent and, therefore, was precluded from receiving permanent partial disability compensation based on work disability (a percentage of disability greater than the percentage of functional impairment). Claimant contends that she acted in good faith in attempting to perform the work respondent offered, but that respondent failed to fully accommodate her restrictions and acted in bad faith in terminating her employment.

Respondent originally argued that claimant's award should be limited to her percentage of functional impairment because she was terminated "for cause" from an accommodated job. However, on March 11, 2002, during the pendency of this appeal, the parties entered into an Agreed Modified Award. [1] The parties agreed that the accommodated job claimant was offered by respondent paid less than 90 percent of the average weekly wage claimant was earning at the time of her injury. Accordingly, claimant would be entitled to a work disability irrespective of any findings concerning good faith. Specifically, the parties agreed:

> 1. During the time in which an accommodated job was offered to the claimant she experienced a wage loss. The accommodated job was offered at $16.61 per hour which would represent a base wage of $664.40 per week. The accommodated wage would represent a wage loss of 36%.
>
> 2. The claimant has sustained a task loss of 59% pursuant to the testimony of Philip R. Mills, M.D.
>
> 3. Because the accommodated job did not return the claimant to comparable wage, she is entitled to a work disability of 47.5% without regard to the issues to be decided by the Board concerning her termination.
>
> 4. The claimant is entitled to a 10% functional impairment followed by a 47.5% work disability.
>
> 5. The parties have specifically reserved for de novo review by the Appeals Board the remaining issue of whether the claimant should be entitled to a work disability on the basis of a 100% wage loss. [2]

The parties do not dispute that claimant made a good faith effort to find employment after her termination by respondent. Accordingly, the only issue for the Board's determination concerns the good faith or lack thereof surrounding the circumstances of

---

[1] This Agreed Modified Award was not forwarded to the Board by the parties until July 10, 2002, although respondent's counsel had notified the Board on January 30, 2002 that "an agreed upon a (sic) work disability figure and Award which utilizes the claimant's task loss and actual wage loss while she was employed by the respondent" had been reached and would be furnished to the Board.

[2] March 11, 2002 Agreed Modified Award.

claimant's termination. The answer to that question will determine whether claimant is entitled to a work disability on the basis of her actual 100 percent wage loss, or if instead the wage claimant was earning with respondent at the time of her termination should be imputed to her. If that wage is imputed, claimant's wage loss would remain at 36 percent and, when averaged with the 59 percent task loss, her work disability is 47.5 percent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Initially, claimant alleged injury to her right upper extremity from performing her normal job duties with respondent beginning "4-6-99 and each and every day worked thereafter." [3] The claim was amended to allege injuries to claimant's "Right hand, arm, shoulder, and neck and left hand and arm" from "Constant, repetitive, gripping, grasping, pushing, pulling, twisting, lifting and working in akward positions " from "Approx. 3/99 and each and every working day thereafter to approx. 10/14/99." [4] Ultimately, the parties stipulated that "Claimant met with personal injury by accident, arising out of and in the course of her employment, on April 6, 1999." [5]

Claimant underwent right carpal tunnel release surgery in 1995. She returned to an accommodated job with respondent. But in March 1999 claimant was returned to the position she had held when she developed the carpel tunnel syndrome. Her previous right upper extremity symptoms returned and she began to experience additional symptoms in her right hand, arm, shoulder, her neck, and eventually her left hand and arm, as well. At the time of the December 2, 1999 preliminary hearing, claimant was continuing to do the repetitive work for respondent. Claimant was given temporary restrictions at one point limiting her use of power tools to four hours in an eight hour shift. Just before the December 2, 1999 preliminary hearing, those restrictions were changed by Dr. Wilkinson to limit claimant's use of power tools to no more than 30 minutes at a time and a total of two hours in an eight hour shift . Despite the limitations regarding the use of power tools, claimant testified that she was still required to repetitively use her hands and arms. At that time there were no physician restrictions against repetitive activity with her hands, only restrictions regarding the use of power tools. Claimant testified she was continuing to get worse because of the repetitive activity on the job.

As a result of the December 2, 1999 preliminary hearing, claimant's request for a change of a treating physician was granted. Respondent was ordered to provide a list of three physicians from which claimant selected Dr. Philip R. Mills to be her authorized

---

[3] K-WC E-1 Application for Hearing filed July 19, 1999.

[4] K-WC E-1 Application for Hearing filed Oct. 26, 1999.

[5] Stipulation No. 1, July 3, 2001 Award.

treating physician. On February 22, 2000, Dr. Mills issued a report addressed to the ALJ. Apparently, Dr. Mills believed he was to perform an independent medical evaluation in addition to functioning as the treating physician. At that time Dr. Mills said claimant had not reached maximum medical improvement. Dr. Mills recommended claimant stop repetitious work noting that "the patient did well with her prior job with avoidance of repetitious gripping and wrist flexion and extension." Dr. Mills recommended that "at this point the treatment would be to stop the repetitious work and return her to the work she was tolerating well." This reference was apparently to the crew chief job claimant had performed before March 1999.

Dr. Mills prepared a second report dated March 13, 2000, again addressed to the ALJ. The parties stipulated into evidence both of these reports and Dr. Mills' office notes by a stipulation filed May 23, 2001. In the second report Dr. Mills related that he had talked to Dr. Wilkinson, the company physician at Cessna, on March 1, 2000, and recommended claimant not perform repetitive hand movement type jobs. On March 6, 2000, Dr. Mills completed a return to work status form in which he recommended claimant avoid crimping/splicing, that she do twisting/squeezing/grasping movements on an episodic/periodic basis, that she avoid the use of power tools, riveting, bucking, sanding, and routing, that she have task rotation and avoid cold environments. Dr. Mills considered the mail sorting job claimant was doing to be inappropriate, but approved a housekeeping position that Cessna was apparently considering as of March 6, 2000.

At his deposition, Dr. Mills clarified that the restrictions he placed on claimant on March 13, 2000, were permanent limitations. Dr. Mills further clarified that the mail sorter job, as claimant described it, would not be within his restrictions. However, Dr. Mills also acknowledged that he had approved the mail room job based upon information provided to him by respondent, including a video-tape and a written job description. The mail sorter job as respondent described it did not require gripping and grasping, nor did it require flexion and extension of the wrist. Furthermore, respondent described the job as one that claimant could perform at her own pace with task rotation. Dr. Mills said that if the job required constant reaching, handling, grasping, fingering and feeling as described in the physical demand summary and was not, in fact, a job claimant would perform at her own pace with task rotation then she would not be able to do that job within his restrictions. The mail sorter job summary which was contained in the physical demand document also contradicted the representation by respondent that claimant could take breaks as needed. Dr. Mills said that if the physical demand document, which is Dr. Mills' deposition exhibit number 4, was accurate then claimant could not do the mail sorter job. Dr. Mills said he had only approved the mail sorter job based upon the representations contained in the April 11, 2000 letter from the insurance carrier's case manager that said the job would be "very light, with little to no force required to perform the tasks" there would be "task rotation at the employee's discretion" and that "the work may be performed at the employee's own

pace with position changes and breaks as needed." [6] Dr. Mills clarified that by the term breaks as needed he did not think in terms of the two-ten minute breaks and one-30 minute break that claimant was permitted by the collective bargaining agreement.

> Q. The bottom line, doctor, is you signed off on that document that my client could do the mail work principally because you were told she could work at her own pace?
>
> A. Yes, I didn't have any idea that we were talking about high volume, high production mail. I would not have approved it if it was as she described it to me. [7]

The Board finds claimant's description of the mail clerk or mail sorter job is credible. The job was not what respondent described to Dr. Mills. In particular, the mail clerk job did not fit the criteria of "very light" as that term was understood by Dr. Mills and it was not to be "performed at the employee's own pace, with position changes and breaks as needed."[8] This is evidenced by the fact that after two days working as a mail clerk for Mr. Edwards, she was transferred to another office because it had more work available for her to do. Furthermore, although the return to work agreements provided that the "employee will be required to report immediately any job duties which are in excess of the temporary limitations," [9] when claimant attempted to do that she was not accommodated. Thus, despite claimant's repeated expressions of concerns, respondent did not provide her a job that was within her medical restrictions.

The parties acknowledge that claimant's termination for allegedly refusing to perform an accommodated job that paid less than 90 percent of the average weekly wage she was earning at the time of her accidental injury does not preclude her from a work disability award. The Board finds that because the mail clerk job was not within Dr. Mills' restrictions, the wage claimant was earning at that job should not be imputed to her for purposes of the wage loss prong of the work disability formula. [10] Instead, based on the

---

[6] Mills Depo Ex. 3.

[7] Mills Depo, at 37-38.

[8] Mills Depo Ex. 3.

[9] Cl. Ex. 3 & 4 to R.H. Trans. of 9-13-00.

[10] K.S.A. 44-510e(a).

totality of the circumstances, claimant's actual 100 percent wage loss should be used. [11]

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated July 3, 2001, and the Agreed Modified Award dated March 11, 2002, both entered by Administrative Law Judge Jon L. Frobish, should be and are hereby modified to increase claimant's work disability award from 47.5 percent to 79.5 percent beginning April 4, 2000.

As of December 9, 2002, there will be due and owing to the claimant 3.29 weeks of temporary total disability benefits, at the rate of $366.00 per week, totaling $1,204.14, plus 188.57 weeks of permanent partial disability benefits, at the rate of $366.00 per week, totaling $69,016.62 for a total of $70,220.76 all of which is due and owing less any amounts previously paid. Thereafter, the remainder of the award, in the amount of $29,779.24 shall be paid at the rate of $366.00 per week for 81.36 weeks or until the award is paid in full or until further order of the Director of Workers Compensation.

The Board adopts the remaining orders of the Administrative Law Judge not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of December 2002.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

[11] *See, Watson v. Johnson Controls, Inc.*, ___Kan. App. 2d ___, 36 P.3d 323 (2001); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

c: Steven R. Wilson, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation